**[Cite as *State v. Clay*, 2012-Ohio-5011.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2011-12-016 |
| | : | O P I N I O N |
| - vs - | | 10/29/2012 |
| | : | |
| JAMIE CLAY, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CRI20100137

Stephen J. Pronai, Madison County Prosecuting Attorney, Rachel M. Price, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Jamie Clay, #A646543, London Correctional Institution, P.O. Box 69, London, Ohio 43140, defendant-appellant, pro se

**YOUNG, J.**

**{¶ 1}** Defendant-appellant, Jamie Clay, appeals pro se from a Madison County Court of Common Pleas decision resentencing him upon remand from this court to correct an allied-offenses sentencing error.

**{¶ 2}** Clay was indicted in November 2010 on one count of robbery in violation of R.C. 2911.02(A)(3), one count of possession of criminal tools in violation of R.C. 2923.24(A),

and one count of vandalism in violation of R.C. 2909.05(B)(2). The state alleged that on November 9, 2010, Clay went into the Merchant's National Bank in London, Ohio, handed a bank teller a handwritten note that stated he would kill everyone if his demands were not met; he was in fact unarmed. After receiving an unspecified amount of money, Clay grabbed both the note and money and fled from the bank. The police apprehended Clay and his girlfriend shortly after the incident. After being arrested and placed in a police cruiser, Clay kicked out the window of the cruiser when he believed the officers were handling his girlfriend too roughly. This act led to the vandalism charge.

**{¶ 3}** Clay ultimately pled guilty to all three counts. On February 2, 2011, the trial court sentenced him to a total of six years in prison. Clay received a sentence of one year for the possession of criminal tools and one year for vandalism which were to run concurrent to each other but consecutive to the five years he received for robbery. Clay appealed his sentence to this court.

**{¶ 4}** On direct appeal, we affirmed the trial court's imposition of maximum, consecutive sentences. *State v. Clay*, 196 Ohio App.3d 305, 2011-Ohio-5086, ¶ 13 (12th Dist.) (*Clay I*). However, we reversed the portion of his sentence for robbery and possession of criminal tools finding these to be allied offenses of similar import. *Id.* at ¶ 27. The matter was remanded to the trial court with instructions to merge the offenses at sentencing after the state elected which of the allied offenses to pursue. *Id.*

**{¶ 5}** Upon remand from this court, the trial court held a new sentencing hearing on November 4, 2011, during which the state elected to pursue sentencing on Clay's robbery offense.[1] The trial court merged the two offenses and proceeded to sentencing on the robbery offense. At the sentencing hearing, the state indicated that it believed Clay could

1. The resentencing hearing took place on November 4, 2011, and the trial court journalized the judgment entry on November 14, 2011.

only receive a maximum sentence of 36 months of incarceration because the Ohio legislature in 2011 Am.Sub.H.B. No. 86 (H.B. 86) reduced the maximum penalty for a third-degree felony robbery from 5 years to 36 months. The trial court agreed that H.B. 86 applied to Clay because the sentencing occurred after September 30, 2011, the effective date of H.B. 86. At the hearing the following exchange took place:

> THE COURT: Now, because sentencing comes after September 30th, for consecutive sentences to be imposed, we have to go back to the pre-Foster analysis.
>
> * * *
>
> [THE STATE]: Ethically, I am concerned, Your Honor, that as we sit here right now with respect to Count 1 that we may not be able to impose the sentence that was originally imposed, and what I'm referring to again is House Bill 86. * * * I have no idea what the thought process here was, but as I read the modifications, on a Felony 3 robbery, it is a 36-month maximum sentence with the exception if you have previously been convicted of robbery or burglary, I believe two times, and I can't find that in the defendant's record so I'm not sure the Court can get beyond that at this point. I don't know if the Court has had any time to consider that.
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> THE COURT: I have.

**{¶ 6}** The trial court also expressed concern that H.B. 86 modified Clay's vandalism conviction from a felony in the fifth degree to a first-degree misdemeanor as the value of the damages caused by Clay, as listed in the indictment, was under $1,000. However, the trial court found that because the property belonged to the government, the dollar amount did not matter. Ultimately, the trial court ordered a sentence of 36 months for the robbery offense and a one-year sentence on the vandalism offense. After making findings as required by the current version of R.C. 2929.14(C)(4), the trial court ordered the sentence for vandalism to run consecutive to the sentence for robbery.

**{¶ 7}** Clay now appeals the trial court's decision, raising four assignments of error for review. For ease of discussion, we combine assignments of error where the issues overlap.

**{¶ 8}** Assignment of Error No. 1:

**{¶ 9}** THE TRIAL COURT ERRED IN IMPOSING MAXIMUM CONSECUTIVE SENTENCES UPON APPELLANT.

**{¶ 10}** Assignment of Error No. 2:

**{¶ 11}** THE TRIAL COURT ERRED IN SENTENCING BY IMPOSING APPELLANT TO A PRISON TERM FOR A MISDEMEANOR OFFENSE.

**{¶ 12}** In his first and second assignments of error, Clay essentially argues that on remand, the trial court erred in sentencing him. He argues that the trial court did not properly apply the modifications contained in H.B. 86. Specifically, he argues that the trial court improperly imposed maximum and consecutive sentences in violation of H.B. 86. In his second assignment of error, Clay argues that his one-year sentence for vandalism was improper as H.B. 86 amended the offense of vandalism from a felony in the fifth degree to a first-degree misdemeanor.

**{¶ 13}** Initially, we note that based on the misinformation provided by the state, the trial court found that the "parameters of sentencing are 36 months on the robbery [offense] and a maximum of a year on the vandalism [offense]." However, both the state and the trial court were incorrect in its determination that H.B 86 applied to Clay's resentencing.

**{¶ 14}** H.B. 86 amended R.C. 2929.14(A)(3) to change the range of possible prison terms for certain third-degree felonies. As amended, R.C. 2929.14(A)(3)(b) reduces the range of penalties for most felonies of the third degree, including robbery, to 9, 12, 18, 24, 30, or 36 months. Previously, the maximum penalty for a third-degree felony robbery offense was five years. H.B. 86 was enacted on June 29, 2011, and became effective on September 30, 2011.

**{¶ 15}** The General Assembly expressly provided in Section 4 of H.B. 86 that the amendments to R.C. 2929.14(A) "apply to a person who commits an offense specified or

penalized under those sections on or after the effective date of this section and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable." R.C. 1.58(B), in turn, states: "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, *if not already imposed*, shall be imposed according to the statute as amended." (Emphasis added.) Section 4 specifically states the legislature's intent not to make the changes to the sentencing laws retroactive unless the offender falls within the exception found in R.C. 1.58(B). *See also State ex. rel. Royster v. Brown*, 5th Dist. No. 2011 CA 00278, 2012-Ohio-2879, ¶ 4.

**{¶ 16}** In the present case, Clay committed these offenses on or about November 9, 2010, well before the September 30, 2011 effective date of H.B. 86. Accordingly, Clay would only receive the benefit of a reduced sentence if the penalty or punishment for the robbery offense had not "already been imposed" under R.C. 1.58(B). We must therefore determine when Clay had a penalty, forfeiture, or punishment imposed for the robbery offense. To make this determination, we consult R.C. 2929.01(EE) and R.C. 2929.01(DD).

**{¶ 17}** R.C. 2929.01(EE) provides that the word "sentence" means "the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense." The word "sanction" is defined by R.C. 2929.01(DD) to mean "*any penalty imposed* upon an offender who is convicted of or pleads guilty to an offense, as *punishment for the offense*." (Emphasis added.) "Both of these statutes convey a clear and definite meaning. Simply put, a sentence is a penalty or combination of penalties imposed on a defendant as punishment for the offense he or she is found guilty of committing." *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, ¶ 28. Based on the definition of a sentence, a penalty and punishment was imposed upon Clay for the robbery offense when he received his sentence.

**{¶ 18}** In *Clay I*, we reversed Clay's original sentence for robbery and possession of criminal tools as we found these to be allied offenses of similar import. *Clay I* at ¶ 27. The Supreme Court of Ohio made it clear in *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, that a court improperly convicts a defendant of two allied offenses, in violation of R.C. 2941.25, when there is *both* a guilty verdict *and* the imposition of a sentence or penalty. *Id.* at ¶ 12. Accordingly, there is no allied-offenses sentencing error if a sentence has not been imposed. As such, Clay had a "penalty imposed" on the robbery and the criminal tools offenses at the original sentencing hearing on February 2, 2011, prior to the effective date of H.B. 86. The fact that this court reversed the sentences and remanded the matter to the trial court to correct this error does not negate the fact that Clay had a "penalty imposed." Rather, upon remand, the trial court is merely removing one of the penalties previously imposed in order to comply with the mandates of R.C. 2941.25 and the decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. The trial court is to then resentence and re-impose a penalty that is appropriate for the offense that remains after the state elects which offense to merge. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 13.

**{¶ 19}** Further, we note that only a portion of Clay's sentence was reversed in *Clay I.* His sentence for vandalism remained intact as we affirmed that part of Clay's sentence. The resentencing was therefore limited to the purpose of correcting the allied-offense error in the original sentence. *See Clay I* at ¶ 27. Upon remand, the state was to elect which allied-offense Clay would be sentenced on. Although this was a new sentencing hearing under *Wilson*, such a fact did not require or even allow the trial court to apply the amendments of H.B. 86 as Clay's sentence had already been imposed. *Wilson* at paragraph one of the syllabus. In fact, as properly noted by the trial court, "[t]he sentence reverts to the day that it was *originally imposed*, so it doesn't start today; it starts at his original incarceration." (Emphasis added.) Based on the foregoing, Clay does not qualify for the exception found in

R.C. 1.58(B) as his penalty for the robbery offense had already been imposed prior to the effective date of H.B. 86. Therefore, the trial court erred in applying H.B. 86 and finding that the maximum penalty for the robbery offense was 36 months.

**{¶ 20}** In reaching this conclusion, we note that Clay has not argued that he did not have a penalty or punishment imposed prior to the resentencing on November 14, 2011, as asserted by the dissent. And we cannot ignore the fact that Clay had a penalty imposed on February 2, 2011, seven months prior to the September 30, 2011 effective date of H.B. 86. Rather, Clay argues that the instruction on remand was to "re-impose" a sentence consistent with the appellate court's ruling. Clay asserts that on remand the trial court was correcting the sentence already imposed on robbery and possession of criminal tools. Such an argument supports this court's conclusion that a penalty and punishment had already been imposed.

**{¶ 21}** Furthermore, although the dissent relies upon the fact that Clay successfully challenged his original sentence on the basis of an allied-offenses sentencing error, Clay has never advanced this argument. Clay has not argued and we do not find that his success in appealing his original sentence for robbery and possession of criminal tools resulted in these sentences being treated as void *ab initio*. While the trial court, upon remand for an allied offenses sentencing error, is obligated to receive evidence and resentence the defendant on the merged offense, there is nothing that requires the court to impose a new or different penalty. *See* R.C. 2929.19; *State v. Wilson*, 2011-Ohio-2669 at ¶ 15. The trial court is permitted, in its discretion, to re-impose the original penalty for the offense that remains after merger.

**{¶ 22}** As set forth above, the court's application of H.B. 86 was not permitted by law

as the legislature did not intend the amendments to apply to offenders such as Clay.[2] The application of H.B. 86 during resentencing affected the trial court's decision to impose a 36-month sentence, rather than the original five-year sentence. There is nothing in the record to suggest that upon further consideration or new evidence presented during the resentencing hearing that the trial court found the robbery conviction warranted a lesser penalty than what was previously imposed. Rather, it was the erroneous application of H.B. 86 which led to Clay's reduced sentence. The court stated: "With regard to the count of robbery, the maximum sentence now allowable by law is three years, 36 months. It's imposed." This reasoning was incorrect. Clay was still eligible to receive a maximum of a five-year sentence on the robbery conviction. As the trial court erred in setting forth the sentencing parameters permitted by law for Clay's third-degree felony robbery conviction, we do not reach the merits of his assignments of error as the errors relate to the application of H.B. 86 to his sentence. We, therefore, reverse the sentence for robbery and remand this cause to the trial court for resentencing only on that offense. *See* R.C. 2953.08(G)(2). Upon remand, the trial court is instructed to apply the sentencing laws, including R.C. 2929.14, that were in effect prior to the effective date of H.B. 86.

**{¶ 23}** Clay's first assignment of error is sustained but only to the extent that the trial court erred in sentencing Clay under the provisions of H.B. 86 as previously noted above.

**{¶ 24}** As to Clay's second assignment of error pertaining to the sentence for vandalism, we affirmed the trial court's imposition of a maximum, consecutive sentence on direct appeal in *Clay I*, 2011-Ohio-5086 at ¶ 13. Further, this portion of Clay's sentence was

2. Clay argues that the state never objected to the application of H.B. 86 during resentencing nor did it cross-appeal to attack the modification of the robbery sentence from 5 years to 36 months, and therefore the issue is barred by res judicata. However, a prosecutor cannot bind the people or the court to an unlawful sentence by failing to properly appeal it. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 28. Furthermore, "[t]he interests that underlie res judicata, although critically important, do not override our duty to sentence defendants as required by the law." *Id* at ¶ 27.

not subject to our remand. *See Clay I* at ¶ 27. Because a trial court has no authority to extend or vary the scope of an appellate court's remand order, the trial court on remand had no authority to resentence Clay on the vandalism offense. *Nolan v. Nolan*, 11 Ohio St.3d 1 (1984), syllabus; *State v. Poindexter*, 2d Dist. No. 22315, 2008-Ohio-4143, ¶ 11; *See also State v. Hoop*, 12th Dist. No. CA2000-11-034, 2001 WL 877296, *3 (Aug. 6, 2001). Although we find that the trial court erred in addressing Clay's sentence for vandalism, we find that such error was harmless as it ultimately imposed the same sentence as it had at the original sentencing hearing.

**{¶ 25}** Clay's second assignment of error is overruled.

**{¶ 26}** Assignment of Error No. 3:

**{¶ 27}** TRIAL COURT ERRED IN SENTENCING BY FAILING TO PROPERLY INSTRUCT APPELLANT OF ALL POST-SENTENCING RIGHTS.

**{¶ 28}** In his third assignment of error, Clay argues that during resentencing, the trial court failed to advise him of his rights to appeal the trial court's decision and failed to inform him of the costs of prosecution. As we found under Clay's first assignment of error that he is entitled to a new sentencing hearing, this assignment of error has been rendered moot. *See* App.R. 12(A)(1)(c). However, we remind the trial court of its obligation to advise appellant of his rights pursuant to Crim.R. 32(B)(2) and (3).

**{¶ 29}** Assignment of Error No. 4:

**{¶ 30}** INEFFECTIVE [ASSISTANCE] OF COUNSEL

**{¶ 31}** Clay argues in his final assignment of error that he received ineffective assistance of counsel during his resentencing hearing. Specifically, Clay argues that his counsel was ineffective for failing to object to the imposition of maximum, consecutive prison terms. However, in light of our finding regarding Clay's first assignment of error, we find this issue is also moot. *See* App.R. 12(A)(1)(c). Clay also argues that his counsel was

ineffective as counsel failed to inform him that he had previously withdrawn from the case.

**{¶ 32}** To prevail on an ineffective assistance of counsel claim, Clay must show that counsel's performance fell below an objective standard of reasonableness and he was prejudiced as a result. *State v. Ward-Douglas*, 12th Dist. No. CA2011-05-042, 2012-Ohio-4023, ¶ 96, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052 (1984); *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶ 6. In order to demonstrate prejudice, an appellant must establish, but for counsel's errors, there is a reasonable probability that the result of trial would have been different; a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Burke* at ¶ 6. The failure to make an adequate showing on either prong is fatal to an ineffective assistance of counsel claim. *State v. Zielinski*, 12th Dist. No. CA2010-12-121, 2011-Ohio-6535, ¶ 50.

**{¶ 33}** Here, Clay has failed to point to any prejudice that he suffered as a result of his counsel's failure to inform him that he had previously withdrawn from the case. Clay states that had he been aware of counsel's prior request to withdraw, he would have requested new counsel. However, Clay still fails to show how this would have changed the outcome. Accordingly, Clay has failed to make an adequate showing of prejudice under the second prong. Clay's fourth assignment of error is overruled.

**{¶ 34}** For the reasons set forth above, we affirm Clay's sentence for vandalism, but reverse the sentence for robbery and remand this cause to the trial court for further proceedings consistent with this opinion.

**{¶ 35}** Judgment affirmed in part and reversed in part, and cause remanded.

PIPER, J., concurs.

HENDRICKSON, P.J., concurs in part and dissents in part.

**HENDRICKSON, P.J., concurring in part and dissenting in part.**

**{¶ 36}** I concur with the majority's decision that the trial court's reconsideration of appellant's sentence for vandalism was harmless error. However, I respectfully dissent from the majority's decision to reverse appellant's robbery sentence because I believe H.B. 86 applies to appellant as he falls within the R.C. 1.58(B) exception provided in Section 4 of H.B. 86. While appellant committed the robbery offense prior to the September 30, 2011 effective date, his sentence for robbery was not imposed until November 14, 2011. Based upon findings by the Ohio Supreme Court, I would instead affirm the trial court's decision imposing a 36-month sentence for the robbery conviction to be served consecutive to the 1-year sentence for vandalism.

**{¶ 37}** As noted by the majority, H.B. 86 applies retroactively only through the legislature's inclusion of R.C. 1.58(B) in Section 4. R.C. 1.58 provides: "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended." H.B. 86 amended R.C. 2929.14(A)(3) such that the penalty for a third-degree felony robbery offense was reduced from a maximum of 5 years to a maximum of 36 months. Here, appellant was convicted of robbery, a third-degree felony. Accordingly, as he committed the robbery before the effective date, he would only receive the benefit of the reduced penalty under the changes contained in H.B. 86 if, under R.C. 1.58(B), the penalty had not already been imposed.

**{¶ 38}** On October 3, 2011, this Court reversed appellant's original sentences for robbery and criminal tools after finding the two offenses were allied offenses of similar import. *State v. Clay*, 196 Ohio App.3d 305, 2011-Ohio-5086, ¶ 27 (12th Dist.) ("Insofar as the trial court failed to merge the offenses or robbery and possession of criminal tools at sentencing, the judgment of the trial court imposing individual sentences for both sentences is reversed,

and this matter is remanded for further proceedings according to law and consistent with this opinion"). Although ignored by the majority, Clay received individual sentences for each offense as Ohio's felony-sentencing scheme is designed to focus the judge's attention on one offense at a time. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 8. R.C. 2929.14 requires the sentencing judge to assign "a particular sentence to *each* of the [ ] offenses *separately*." (Emphasis sic.) *Id.* "The statute makes no provision for grouping offenses together and imposing a single 'lump' sentence for multiple felonies." *Id*. "[A] judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense. See R.C. 2929.11 through 2929.19." *Id*. at ¶ 9. Further, R.C. 2929.01(FF) explicitly defines "*a* sentence" as those sanctions imposed for "*an* offense." "The use of the articles 'a' and 'an' modifying 'sentence' and 'offense' denotes the singular." *Saxon* at ¶ 13. Accordingly, Clay received a separate *sentence*, and therefore a separate penalty, for each offense which resulted in an aggregate prison term. Any suggestion that Clay received one "lump" sentence, rather than a sentence on each offense is contrary to Ohio's sentencing laws. Consequently, based on this court's reversal of the original sentence and the scope of a resentencing hearing as required by the Supreme Court, I would have found that appellant's penalty or punishment for robbery was not imposed until November 14, 2011, after the effective date of H.B. 86. Accordingly, because resentencing did not occur until after the effective date, the trial court properly found that R.C. 1.58(B) applied and the maximum penalty it could impose upon appellant was 36 months

instead of a 5-year term of imprisonment.[3]

**{¶ 39}** Pursuant to R.C. 2953.08(G)(2), an appellate court may vacate a sentence and remand for a new sentencing hearing if the sentence is contrary to law. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 14. "A sentence that contains an allied-offenses sentencing error is contrary to law." *Id*. The Supreme Court has specifically stated that upon finding an allied-offenses sentencing error, the appellate court "*must* reverse the judgment of conviction and remand for a new sentencing hearing." (Emphasis Added.) *State v. Whitfield*, 124 Ohio St.3d. 319, 2010-Ohio-2, ¶ 25. The hearing is de novo only for those sentences that were reversed due to the allied-offenses sentencing error; "the sentences for any offenses that were not affected by the appealed error are not vacated and are not subject for review." *Wilson* at ¶ 15.

**{¶ 40}** Based on the Ohio Supreme Court's decisions in *Wilson* and *Whitfield*, it is clear that a finding of an allied-offenses error reverses not only the sentence but the judgment of conviction. It therefore cannot be said that the original sentence remains intact. Furthermore, the Supreme Court has been explicit as to the scope of the new sentencing hearing for allied-offense sentencing errors. Unlike resentencing due to errors in advising post-release control which only require a sentencing hearing "limited to [the] proper imposition of postrelease control," the remand for allied-offenses sentencing error requires the trial court to conduct a new sentencing hearing. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, syllabus.

3. The Second District has agreed that H.B. 86 applies to a person, "who is being sentenced after the effective date of the statute." *State v. Gatewood*, 2nd Dist. No. 2012-12, 2012-Ohio-4181, ¶ 15. In *Gatewood*, the appellant was being resentenced for crimes committed in 2006 and the court found H.B. 86 applied to him as resentencing occurred after the effective date of H.B. 86. The Fourth District has also implied that H.B. 86 would apply to a defendant who was being resentenced after the effective date. *See State v. Anderson*, 4th Dist. No. 10CA44, 2012-Ohio-3245, ¶ 41 (acknowledging H.B. 86, but finding that such amendments did not apply to appellant as he was resentenced prior to the effective date of H.B. 86).

**{¶ 41}** In *Wilson*, the Supreme Court explained: "At the hearing, the trial court must accept the state's choice among allied offenses, 'merge the crimes into a single conviction for sentencing, * * * and impose a sentence that is appropriate for the merged offense.'" *Wilson* at ¶ 13, quoting *Whitfield* at ¶ 24. Accordingly, the trial court is imposing a new sentence and one that is appropriate for the merged offense. As such, this is a sentence that is being imposed for the first time. Additionally, it is important to note that res judicata does not preclude a defendant from objecting to issues that arise at the new sentencing hearing or from the resulting sentence. *Wilson* at ¶ 30. In fashioning an appropriate sentence for the merged offense, the court is entitled to hear new evidence. *See* R.C. 2929.19. The trial court is not required to solely consider the record from the first hearing unless the parties stipulate to the court's consideration of the record from the original hearing. *See Wilson* at ¶ 15 ("the parties may stipulate to the sentencing court's considering the record as it stood at the first sentencing hearing"). In fact, in one of this court's recently decided cases, *State v. Craycraft*, 12th Dist. Nos. CA2011-04-029 and CA2011-04-030, 2012-Ohio-884, after a remand due to an allied offense error, the trial court merged the requisite offenses then imposed a higher term of imprisonment for the remaining offenses than what was originally imposed. We affirmed this decision. *Id.* at ¶ 17.[4] Similarly, other districts have also affirmed

4. In *Craycraft* at ¶ 14-15, this court stated:

> Appellant also argues that there was no evidence presented to justify increasing his sentence from two consecutive six-year prison terms to two consecutive eight-year prison terms. According to appellant, this indicates actual vindictiveness on the part of the trial court. However, as noted above, the trial court was required to conduct a de novo review of the affected sentences and "impose a sentence that [was] appropriate for the merged offense" upon remand. *Wilson,* 2011-Ohio-2669 at ¶ 15, 18; *Whitfield*, 2010-Ohio-2 at ¶ 24.
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> Furthermore, prior to sentencing appellant to serve two consecutive eight-year prison terms upon remand, the trial court specifically stated that it had considered appellant's extensive criminal history, the severity of the victims' injuries, the victims' ages at the time of the assault, appellant's relationship to the victims, and his lack of remorse. We find no error in the trial court's

decisions to increase the offender's sentence upon remand after an allied-offenses sentencing error. *See State v. Mitchell*, 6th Dist. No. E-11-039, 2012-Ohio-1992, ¶ 4, 14; *State v. Quinones*, 8th Dist. No. 97054, 2012-Ohio-1939, ¶ 3 (finding that on remand, the "trial court is free to impose the identical sentence that was originally imposed, or a greater or lesser sentence within its discretion" but reversing the sentence based on the trial court's use of an illegal "sentencing package"). Given that a trial court is entitled to hear new evidence and even modify a defendant's sentence on remand, this provides further proof that the resentencing hearing is de novo and that a sentence is not imposed until after this hearing.

**{¶ 42}** Based on the foregoing and the Ohio Supreme Court determinations as discussed above, I find that the result of our decision finding an allied-offenses sentencing error and reversing appellant's original sentences for robbery and criminal tools was such that the penalty for these offenses were not imposed during the original sentencing hearing on February 2, 2011. Rather, the trial court imposed a sentence and therefore the penalty on the new *merged offense* of robbery on November 14, 2011. As the imposition of the penalty occurred after the effective date of H.B. 86, R.C. 1.58(B) and Section 4 of H.B. 86 required appellant to be sentenced under the sentencing statutes as amended. I feel based upon the current state of the law that I am obligated to affirm that appellant was entitled to the benefit of the reduced penalty found in the amended version of R.C. 2929.14(A)(3).

**{¶ 43}** As indicated above, I would have affirmed the trial court's decision imposing a 36-month sentence for the robbery conviction to be served consecutive to the 1-year sentence for vandalism.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

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decision finding two consecutive eight-year prison terms was an appropriate sentence.